82-438

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.,
Plaintiff-Respondent

V.

LINMARK ASSOCIATES, INC.,
Defendant-Petitioner

PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF U.S. COURT OF APPEALS, THIRD CIRCUIT, DOCKET NO. 81-2414

Joseph S. Georgiana, Esq.
CAPEHART & SCATCHARD, P.A.
A Professional Corporation
304 Harper Drive
Moorestown, NJ 08057
(609) 234-6800
Attorney for Petitioner

The Superior Appellate Printing Company, Cranbury, NJ 08512

QUESTIONS PRESENTED FOR REVIEW

1. What are the standards governing the conduct of a federal court trial judge during a civil jury trial which assure that a litigant is not deprived of a fair trial by virtue of remarks and conduct of the trial judge in violation of the guarantee of the Due Process Clause of the Fifth Amendment to the U.S. Constitution which entitles a person to an impartial and disinterested tribunal in civil and criminal cases?

2. Has the federal court trial judge in this case by his remarks and conduct during the trial departed from the standards of fairness and impartiality required in judicial proceedings, thereby depriving petitioner of a fair trial in a fair tribunal?

3. Has the U.S. Court of Appeals, Third Circuit, by affirming the judgment entered in the trial court sanctioned the departure of the trial judge from the standards of fairness and impartiality required for a fair trial in a fair tribunal so as to call for the exercise of the power of supervisions of the U.S. Supreme Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GROUNDS FOR JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	13
CONCLUSION	17
APPENDIX	
A. Judgment Order entered July 13, 1982 in the United States Court of Appeals	1a
B. Petition for Rehearing	3a
C. Opinion entered June 17, 1981 in the United States District Court for the District of New Jersey	5a

TABLE OF AUTHORITIES

Cases	Page
Goldstein v. United States, 8th Cir. 1933, 63 F.2d 609 ..	13
Knapp v. Kinsey, 6th Cir. 1956, 232 F.2d 458	13,14
Marshall v. Jerrico, Inc., 100 S.Ct. 1610 (1980)	13
In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. (1955)	13
Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11. (1954)	13
Quercia v. United States, 389 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321 (1933).....	13
Travelers Insurance Company v. Ryan, 5th Cir. 1969, 416 F.2d 363	13

GROUNDS FOR JURISDICTION

This petition for writ of certiorari is made under 28 U.S.C.A. Section 1254(a), to review a final judgment of the U.S. Court of Appeals, Third Circuit, dated and entered July 13, 1982. An order denying a petition for rehearing en banc was filed and dated August 5, 1982.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the Due Process Clause of the Fifth Amendment to the U.S. Constitution which provides in pertinent part:

"No person shall . . . . be deprived of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

This diversity action was brought by the plaintiff-respondent, a general building contractor, against defendant-petitioner, a real estate holding and development company, in the U.S. District Court for the District of New Jersey, to recover damages for construction work performed by plaintiff on an I.H.O.P. restaurant project on property of defendant located in Maple Shade, New Jersey.

The action arose out of a transaction in which defendant purchased the property site for a proposed I.H.O.P. restaurant and was the lessor under a 25 year lease with an I.H.O.P. franchisee, Watkins Corporation, of Virginia, as the lessee. The lease provided that the lessor would furnish $270,000. for construction of the restaurant and that costs in excess of $270,000. would be paid by the lessee. Defendant's involvement in the transaction was initiated by a real estate broker named Seymour Ehrenkrantz who was defendant's contact with the lessee. Plaintiff entered a contract with the lessee for construction of the project. Defendant obtained a bank loan to finance its costs in the project. The proceeds of that loan were the source of monies paid by defendant to plaintiff for construction work on the project. When the project was 60% complete, the lessee was adjudicated a bankrupt in the federal court in Virginia and plaintiff stopped work on the project. Plaintiff sued defendant to recover damages of $112,509.05, upon various legal theories, including third-party beneficiary, constructive trust and *quantum meruit*.

The original complaint was filed March 19, 1980. The case was tried before a jury on March 16, 17, 18, 19 and 20, 1981. A jury verdict was rendered in favor of plaintiff against defendant in the sum of $112,509.05, with costs, and a judgment was entered on the verdict by the trial court on March 24, 1981. Defendant's motions for judgment N.O.V. and for a new trial were denied by the trial court in a written opinion filed June 17, 1981. Plaintiff's motion to add to the judgment pre-judgment interest of $16,817.78 was granted by the trial court by order dated and filed July 6, 1981. A notice of appeal was filed with the U.S. Court of Appeals, Third Circuit, on July 15, 1981. The

lower court judgment was affirmed, without written opinion, by a judgment of the court of appeals entered July 13, 1982. A petition for rehearing was denied by order entered August 5, 1982.

The facts material to the consideration of the questions presented for review concern remarks and conduct of the trial judge during the trial which are summarized as follows:

During the direct examination of the defendant witness, Ehrenkrantz, regarding the sharing of a commission on the purchase of the land with Mr. Markowitz, principal of defendant, the trial judge intervened in the proceedings as shown by the court record:

"Q Did you get a commission in the sale transaction involving the grounds?

A. Yes, I did.

Q Approximately how much was your commission?

A. Twenty-two hundred dollars.

Q Was part of that commission shared with another entity?

A. Yes, it was.

Q What was the other entity?

A. Mr. Markowitz.

Q Was it Mr. Markowitz personally or one of his companies.

A. Personally.

THE COURT: Markowitz was the buyer?

THE WITNESS: He was the buyer.

THE COURT: You shared a commission that was charged against the seller, the seller paid you a commission and you shared that commission with Mr. Markowitz?

THE WITNESS: Yes. That was part of my commission agreement with Mr. Markowitz.

THE COURT: It is a kickback of a part of the purchase price?

THE WITNESS: It was not a kickback, sir.

THE COURT: What was it?

THE WITNESS: Well, he is permitted to deal in real estate, sir.

THE COURT: I understand that. Did he buy it in his name?

THE WITNESS: No, he put it in the name of Linmark, yes.

THE COURT: But, as an individual, you then gave him back a part of the commission, is that it, is that how I understand it?

MR. GEORGIANA: If Your Honor please, may we interject? It is not accurate —

THE COURT: Let me find out. That's why I'm asking the questions.

MR. GEORGIANA: Fine. Okay.

THE COURT: You tell me what happened.

THE WITNESS: My agreement with Mr. Markowitz was that if I could make all these things happen and complete the project, that I would earn a commission of sixteen thousand dollars less fifty percent of anything I would earn on the land commission. I have not been paid. In fact been paid by Mr. Markowitz, his fifty percent.

THE COURT: All right."

On cross-examination of the defense witness, Ehrenkrantz, plaintiff's attorney used the term "kickback" repeatedly and the trial court permitted it, as shown below:

(Ehrenkrantz-Cross)

"Q Now, let me go below that. It says, 'lease, one half of commission, Osinski land,' right?

A. Yes.

Q That is the amount you were paid, right, for the Osinski land?

A. That is one half of the amount I was paid, yes.

Q The other half went to Mr. Markowitz, didn't it?

A. He did not receive it. I gave him credit against my commission as one commission against the other for a total commission — the total commission was sixteen thousand. The balance due I said was $14, 875.

Q So there was an arrangement with you and Mr. Markowitz whereby Mr. Markowitz would get a kickback of $1,125 for the sale of this land, is that correct?

MR. GEORGIANA: I object to that characterization.

A. No.

THE COURT: I used it. I will allow it.

THE WITNESS: I had a contract with Mr. Markowitz to that effect. It wasn't an arrangement — it was a contract.

CONTINUATION BY MR. SPRINGER:

Q So there was a contract to that effect for a kickback?

A. Right.

Q You put it in writing?

A. I did not say it was a kickback. I said it was what I was agreed to, what I would agree to accept as a commission.

THE COURT: Let me ask you this; Did the owner of the property know of the arrangement between you and Mr. Markowitz?

THE WITNESS: I was not the broker.

THE COURT: I ask you, did she know of the arrangement you were going to get back one half of the commission and give one half to Mr. Markowitz?

THE WITNESS: Yes.

CONTINUATION BY MR. SPRINGER:

Q Do you have anything in writing which shows that Mrs. Osinski knew that there was this arrangement for a kickback?

A. I was not dealing with Mrs. Osinski.

Q Did you have anything in writing that shows Mrs. Osinski knew? Yes or no?

A. Sir?

THE COURT: It is a question that can be answered.

THE WITNESS: I have no idea whether she knew or not.

THE COURT: You just told me she knew.

THE WITNESS: From the settlement sheet she would — no, she wouldn't. Okay.

CONTINUATION BY MR. SPRINGER:

Q She didn't know?

A. She didn't know.

Q Fine.

By whom was the commission paid for Mrs. Osinski's sale?

A. I received my commission from a McQue Agency. I was a broker with McQue Agency and I got my half of that commission from that agency.

Q Then your arrangement was to split your half with Mr. Markowitz?

A. Right."

During other stages of the trial, the trial court intervened with comments as shown below:

(DeLuca-Cross)

"Q In other words, materials were left on the site not applied to the building?

A. Yes, sir.

THE COURT: On your building contract, did it provide for the cost of materials incorporated into the building and those delivered to the site, too?

THE WITNESS: Yes, sir.

THE COURT: Proceed."

(DeLuca-Cross)

"Q How is that understanding reached and with whom?

A. I am not sure it was with — between Lipschutz and Linmark. Linmark was paying for all costs; labor, materials and sub-contract costs. Linmark was paying for work that we did.

THE COURT: Whether or not the materials were incorporated into the site or not?

THE WITNESS: Whether or not —

THE COURT: So long as they delivered —

THE WITNESS: As long as they delivered and we were in the process of installing them."

(DeLuca-Cross)

"Q So, that if you were to get $270,000 from Linmark you were looking to Watkins for $87,000, is that correct?

A. Yes.

THE COURT: Let me ask you this, sir: When you left you were operating on a budget of $357,000, correct?

THE WITNESS: Yes, sir.

THE COURT: And, then, two months went by and it cost $20,000 more to make up for that, is that what you are saying?

THE WITNESS: Yes, sir.

THE COURT: So, it becomes $377,000?

THE WITNESS: Yes.

THE COURT: That is the difference that you are talking about?

THE WITNESS: Yes, sir.

THE COURT: All right. You may proceed.

CONTINUATION BY MR. GEORGIANA:

Q But, the difference to Linmark is $100,000 —

MR. SPRINGER: He is arguing now, Your Honor.

THE COURT: I know that. Let's move along."

(DeLuca-Redirect)

"Q The $112,509.05, which you are claiming in this case, doesn't include anything relating to the sprinklers?

A. No, sir.

MR. SPRINGER: That's all I have.

THE COURT: You look for payment from Linmark, is that correct?

THE WITNESS: Yes, sir.

THE COURT: And, did you know Linmark was getting its funds from a bank to cover the costs of construction?

THE WITNESS: Yes.

THE COURT: You knew that?

THE WITNESS: Yes.

THE COURT: Did you know a draft would be paid from time to time from the bank to Linmark?

THE WITNESS: Yes, sir.

THE COURT: Predicated on your invoices?

THE WITNESS: Yes, sir.

THE COURT: And, the bank would make inspections from to time to see if the work was done?

THE WITNESS: Yes, sir.

THE COURT: All right. Are there any other questions?"

(Hutchison-Cross)

"Q After the bank loan was paid, did you have any further interest or involvement with the project?

A. Nope.

MR. GEORGIANA: I have no further questions.

THE COURT: Did you have anything to do with Watkins at all?

THE WITNESS: No, sir.

THE COURT: The loan was extended to Mr. Markowitz's company for the purposes of constructing the building, is that what it was?

THE WITNESS: It was an investment for him, done through Landmark Associates. It was really an accommodation to a customer of the bank.

THE COURT: Being built on his property, his building?

THE WITNESS: He purchased the property, yes sir.

THE COURT: I have no further questions."

(Ehrenkrantz-Redirect)

"Q Feasibility study, two thousand, is that correct?

A. Yes.

Q Who did that?

A. That's an outside agent that did that, that does the demographics.

Q Who paid for the cost?

A. That cost?

Q Who would pay for it?

A. That would be Watkins.

Q Would Lipschutz?

MR. SPRINGER: I don't know if there is any basis, Your Honor, for establishing this witness has knowledge as to who paid all of these bills. I would object until a foundation is laid showing he had some knowledge about each one of these particular items here and who they paid.

MR. GEORGIANA: My question was the responsibility, not the payment.

THE COURT: That will be a jury determination.

MR. GEORGIANA: If Your Honor pleases —

THE COURT: It is a jury determination as to whose responsibility it is to pay.

MR. GEORGIANA: What I want to show is the costs are, in this breakdown which are not in the estimate of July, 1979, of Mr. Lipschutz.

THE COURT: The items are in evidence, aren't they?

MR. GEORGIANA: Well, I don't know.

THE COURT: I'll sustain the objection. Mr. Ehrenkrantz, who owns the property?

THE WITNESS: Linmark.

THE COURT: Who owns the building presently on the property?

THE WITNESS: Linmark.

THE COURT: You may proceed."

ARGUMENT

The Due Process Clause of the U.S. Constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610 (1980).

A fair trial in a fair tribunal is a basic requirement of due process and fairness requires an absence of actual bias in the trial of cases. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

The right of a trial judge in a federal court to participate in the proceedings and to interrogate witnesses is not an unlimited one and should be exercised in conformity with the standards governing the judicial office. *Quercia v. United States*, 389 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). *Knapp v. Kinsey*, 6th Cir. 1956, 232 F.2d. 458. Those standards are specified in *Knapp v. Kinsey, supra*, at page 466:

> "When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored."

Also, the trial judge by words or conduct must not disparage a litigant in the eyes of the jury, *Goldstein v. United States*, 8th Cir. 1933, 63 F.2d. 609, and must maintain an atmosphere of strict neutrality and utmost impartiality, *Travelers Insurance Company v. Ryan*, 5th Cir. 1969, 416 F.2d. 353, so that "justice must satisfy the appearance of justice", *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and the scales of justice are weighed "equally between contending parties", *In re Murchison, supra.*

The foregoing authorities indicate that a litigant in a civil jury trial has a right to a trial judge who is reasonably free of bias toward the litigant and a trial where the atmosphere fostered by the trial judge is one of fairness and impartiality. *Knapp v. Kinsey, supra,* page 467.

Did the trial judge in this case conform to those standards? We think not. Did the U.S. Court of Appeals, Third Circuit, sanction the departure of the trial judge from those standards? We think so.

At the trial, during the direct testimony of the defense witness, Ehrenkrantz, the trial judge introduced the word "kickback" into the case, to characterize the commission agreement between defendant and Ehrenkrantz, which agreement was not material to the issue of liability in the case. There was no reason for the trial judge to inquire into that agreement or to "find out" whether it was a "kickback". Since the word "kickback" connotes impropriety in the public mind, due to news media coverage of various "kickback" charges against public figures, the only conclusion the jury could draw from the trial judge's vigorous pursuit of that subject with Ehrenkrantz was that defendant was engaged in improper activity and that defendant's witnesses were persons of bad character.

The prejudicial effect of the "kickback" remarks of the trial judge compounded on cross-examination of Ehrenkrantz when plaintiff's attorney used the term repeatedly, over the objection of defendant's attorney, with the permission of the trial judge, who said, "I used it. I will allow it." Later, during the cross-examination, the trial judge said, "Let me ask you this, did the owner of the property know of the arrangement between you and Mr. Markowitz?" The trial judge thereby indicated that the owner may have been swindled. In fact, the commission arrangement for the I.H.O.P. project had no affect on the owner, who paid the normal sales commission to her broker and the latter split it with Ehrenkrantz as cooperating broker. If Ehrenkrantz had been paid a commission by defendant for the I.H.O.P. project, the commission would have been reduced by the amount Ehrenkrantz received as cooperating broker. Thus, the "kickback" episode, as introduced into the case by the trial

judge, was totally unnecessary, unjustified, and could only operate to discredit and disparage the defendant in the eyes of the jury. That episode cast an atmosphere of prejudice over defendant's case and deprived defendant of a fair trial. The prejudicial effect was the same as if the trial judge said to the defendant's witnesses, "You are swindlers and crooks." Once the defense witnesses were cast in the role of "bad characters" by the trial judge, their credibility was destroyed and the jury was prevented from exercising an impartial judgment upon the merits. To the ordinary juror, the impression of defendant's witnesses as "bad characters" would be dynamatic and sensational, and that impression could not be erased by a general instruction at the end of the case that the jury was at liberty to disregard the comments of the court in arriving at their findings of fact.

In addition to the "kickback" remarks, the trial judge intervened with questions of witnesses on several occasions in a manner which aligned the judge on the side of the plaintiff. At the end of the testimony of plaintiff's witness, DeLuca, the project superintendent, the trial judge asked a series of questions which were leading and elicited "Yes" answers, relating to plaintiff looking for payment from defendant, knowing that defendant was getting its funds from a bank to cover costs of construction and that the bank issued drafts to defendant, "Predicated on your invoices," and that the bank would make inspections from time to time "to see if the work was done." At the end of the testimony of the defense witness, Ehrenkrantz, the trial judge asked the witness two questions, "Who owns the property? Who owns the building presently on the property?" The ownership of the property and building had been stipulated by the parties in a stipulation of facts read into the evidence at the start of plaintiff's case. Those questions indicated to the jury, that those were the only crucial facts, thereby obscuring the facts needed to support legal theories, such as third-party beneficiary, constructive trust, *quantum merult*. By asking the questions which were posed to the witnesses, at the end of their testimony, and in the form they were framed, the trial judge clearly assumed the role of lawyer for plaintiff, in active support of plaintiff's case.

Considering the horrendous prejudicial effect of the reference by the trial judge to a "kickback" arrangement between defendant and Ehrenkrantz, on the minds of the jury, and the one-sided participation of the judge in support of plaintiff's case, it is obvious that defendant's right to a trial judge who is reasonably free from bias or prejudice, and to a trial where the atmosphere fostered by the judge is one of fairness and impartiality has been violated. The U.S. Court of Appeals, Third Circuit, affirmed the lower court judgment, without any opinion. That action of the appeals court sanctioned the violation of defendant's fundamental right to a fair trial in a fair tribunal. The U.S. Supreme Court must exercise its power of supervision and grant this petition so that the unjust result in the lower courts may be corrected.

CONCLUSION

In light of the conduct of the federal trial judge in this case, and the rubber stamp sanction of that conduct by the appeals court, without the benefit of an opinion giving reasons, this case will provide the U.S. Supreme Court with the opportunity to clarify and fix the standard of conduct of a federal trial judge in a civil jury trial, so that the principle that "justice must satisfy the appearance of justice" may be preserved in all tribunals of the federal court system and so that the public will have the assurance that such courts are governed by fairness and impartiality.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2414

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

v.

LINMARK ASSOCIATES, INC.,

Appellant

(Civil No. 80-0770 — D.N.J. — Camden)

Submitted Under Third Circuit Rule 12(6)
July 9, 1982

BEFORE: SEITZ, *Chief Judge*, SLOVITER, *Circuit Judge*, and McCUNE, *District Judge*.*

---

*Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____

Chief Judge

ATTEST:

_____

Sally Mivos, Clerk

DATED: July 13, 1982

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2414

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

v.

LINMARK ASSOCIATES, INC.,

Appellant

(Civil No. 80-0770 — D.N.J. — Camden)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and McCUNE, *District Judge*.*

---

*Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Chief Judge

DATED: August 5, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.

Plaintiff,

v.

LINMARK ASSOCIATES, INC.,

Defendant.

Civil Action
No. 80-0770

OPINION

APPEARANCES:

Robert C. Beck, Esquire
Beck & D'Elia
P.O. Box 1806
Cherry Hill, New Jersey 08034
and
Stephen J. Springer, Esquire
R. Michael Carr, Esquire
700 I.V.B. Building
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Plaintiff

Joseph S. Georgiana, Esquire
Capehart & Scatchard, P.A.
304 Harper Drive
Moorestown, New Jersey 08057
Attorney for Defendant

BROTMAN, District Judge

On March 24, 1981, subsequent to a jury trial in this matter, judgment was entered in favor of the plaintiff, Robert E. Lipschutz Associates, Inc., and against the defendant, Linmark Associates, Inc., for $112,509.05. Defendant Linmark now has moved this court, under Rule 50(b) Fed. R. Civ. P., to have the jury verdict and the judgment entered thereon on March 24, 1981 set aside and to have judgment entered in favor of defendant against plaintiff on the grounds that:

1. Deleted as not material to this petition.

2. Deleted as not material to this petition.

In the alternative, the defendant has moved, under Rule 59(a) Fed. R. Civ. P., for a new trial on all issues in the case on the grounds that:

1. The use of the term "kickback" by the trial court in a question to defendant's witness, Ehrenkrantz, concerning dealings with the principal of defendant was calculated to disparage defendant in the eyes of the jury and, thus, deprived defendant of a fair trial;

2. The conduct and comments of the trial court during the trial were one-sided in favor of plaintiff and prejudiced the jury against defendant and denied defendant a fair trial.

The two motions and their respective grounds shall be addressed seriatim.

II. MOTION FOR A NEW TRIAL

The defendant has moved this court, pursuant to Rule 59(a) Fed. R. Civ. P., for a new trial on all issues. The defendant has contended that a new trial is necessary because the defendant was deprived of a fair trial. In support of its claim the defendant has asserted two grounds: That the court's use of the term "kickback" in questioning Mr. Ehrenkrantz, a witness for the defendant, was calculated to disparage the defendant in the

eyes of the jury; and that the attitude, conduct and comments of the trial court during the trial were one-sided in favor of plaintiff and prejudiced the jury against the defendant. The defendant has pointed only to one specific incident and to the use of two questions at later points in the proceedings, without discussing the context, to support the second ground.

Upon our reviewing the record, the court finds that the defendant failed to take proper exception at trial to the court's use of the term "kickback"[2] or to any specific questioning which the court conducted during the one incident cited as ground two or to the court's interjection of the two questions ("Who owns the building" and "Who owns the land") set out in the defendant's brief. As a general rule, "[a]bsent proper exception or motion for mistrial, no error is preserved for review." *National Aviation Underwriters, Inc. v. Fischer*, 386 F.2d 582, 586 (8th Cir. 1967). *See also Manhattan Oil Co. v. Mosby*, 72 F.2d 840, 845 (8th Cir. 1934). Based on this principle, the court is not obligated to address defendant's claims and defendant's motion should be denied without addressing the merits of the claim.

In the alternative, even assuming the proper exceptions had been taken, the claims of the defendant do not support the granting of a new trial. In order to justify a new trial, the conduct complained of must be improper and must prejudice the movant in the minds of the jury to the extent that the jury is unable to exercise an impartial judgment upon the merits. *See, e.g., Cromling v. Pittsburgh and Lake Erie R.R. Co.*, 327 F.2d 142, 152 (3rd Cir. 1964); *Myers v. George*, 271 F.2d 168, 174 (8th Cir. 1959); *Stuckey v. Andrews*, 249 F.2d 828, 830 (5th Cir. 1957) *See generally* 6A Moore's Federal Practice, §59.08[2].

---

[2]The court recognizes that the defendant did object when the plaintiff's attorney used the term "kickback" in a question to the same witness. However, this usage occurred after the court had used the term without objection on the defendant's part. The defendant has based his motion on the court's use of the term and not on whether the court's allowing the plaintiff to use the term was prejudicial error. In any event, the discussion below sufficiently addresses the use, in general, of the term in the specific context during the trial.

However, in those cases where the court's remarks may constitute error but the refusal to grant a new trial does not appear inconsistent with substantial justice, then the conduct is considered to be harmless error. A new trial thus would not be warranted. *See* Rule 61 Fed. R. Civ. P.; *Miley v. Delta Marine Drilling Co.*, 473 F.2d 856, 857-58 (5th Cir. 1973).

The court has reviewed the record in light of these principles and has concluded that the defendant received a fair and impartial trial. The court's conduct throughout the trial was not prejudicial and did not prevent the jury from reaching a just verdict. The court believes that its interjecting of questions throughout the trial was impartial, and helpful. "A federal trial judge is not a mere arbitrator who rules upon objections and instructs the jury." *Kornicki v. Calmar S.S. Corp.*, 460 F.2d 1134, 1137 (3rd Cir. 1972). "[I]t is not improper for the judge to seek to develop facts which he deems relevant to the issue before the jury. He may also discuss and comment on the evidence before the jury and is permitted to express his opinion on factual issues and credibility of witnesses so long as he finally makes it clear to the jury that it alone has the burden of decision." *Stuckey v. Andres, supra*, 249 F.2d at 830. The questions which the defendant refers to in its second ground, as well as other questions which the court asked throughout the trial, were aimed at enhancing the jury's proper understanding of the circumstances of the case. In addition, the court's instructions to the jury at the close of the trial clearly emphasized that the jury was the sole determinant of the weight and credibility of the evidence and that the jury was to make the final decision. Certain excerpts from the court's jury instructions illustrate this position:

> You are further instructed, that if I have asked any questions of any of the witnesses during the course of this trial . . . or if I have said or done anything during the trial, or in the course of instructing you now, whereby it seems to you that I am inclined to favor the case of the plaintiff or the case of the defendant, you must remove any such impression from your mind and not permit yourself to be influenced by any such impression, as none was intended to be created.

> Remember at all times, that you as jurors are at liberty to disregard all comments of the court in arriving at your own finding as to the facts . . . .

With particular respect to the term "kickback," the court concludes that it was appropriately used by the court in the specific context. The court was questioning Seymour Ehrenkrantz, who acted as the realtor for the defendant, Linmark, in acquiring the property on which the IHOP was to be built, about a commission sharing arrangement with Markowitz, the principal shareholder and officer of the corporate defendant. The initial questions concerning the sharing of the commission were raised by the defendant's attorney. The court then interjected its questions in an effort to clarify the relationship between Markowitz and Ehrenkrantz. After Ehrenkrantz admitted that the seller had paid him a commission and that he, Ehrenkrantz, had shared the commission with Markowitz, the principal shareholder and officer of the corporate defendant, the court asked if the payment was a kickback of a part of the purchase price. As the following definition of the term "kickback" indicates, this question was appropriate. "Kickback" has been defined as "a percentage payment exacted as a condition for granting assistance by one in a position to open up or control a source of income or gain." Webster's Third New International Dictionary (1971).

Even if the court's use of the term "kickback" was an error, when considered in the context of the specific colloquy and in the context of the rest of the trial, including the jury instructions referred to above, the usage did not affect substantial rights of the defendant and must be considered harmless under Rule 61, Fed. R. Civ. P. Thus, the court concludes that neither of the grounds asserted by the defendant supports the granting of a new trial.

STANLEY S. BROTMAN
United States District Judge

Dated: June 17, 1981

Office - Supreme Court, U.S.
FILED
OCT 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-433

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LINMARK ASSOCIATES, INC.,
Petitioner

v.

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

James M. Marsh
Stephen J. Springer
R. Michael Carr
Counsel for Respondent
Robert E. Lipschutz
Associates, Inc.

OF COUNSEL:

LaBRUM AND DOAK
700 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103
(215) 561-4400

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 238-2000

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Argument	
I. The District Court's Inquiry as to Existence of a "Kickback" Was Unobjectionable	4
II. The "Kickback" Issue is Not Open in This Court Because Petitioner Did Not Object When the District Court Made Its Inquiry	5
III. The District Court's Questioning for the Guidance of the Jury Was Not Only Unobjectionable but Not Objected to by Petitioner's Counsel	6
Conclusion	8

No. 82-433

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LINMARK ASSOCIATES, INC.,
Petitioner

v.

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Robert E. Lipschutz Associates, Inc., by its counsel, respectfully requests this Court to deny the Petition for Certiorari for the reasons set forth herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is not reported. A shortened version appears as Appendix C to the petition for certiorari.

The Court of Appeals for the Third Circuit did not render any opinion. That court's order affirming the judgment of the District Court appears as Appendix A to the petition for certiorari, and its order denying the Petition for rehearing appears as Appendix B to the petition for certiorari.

JURISDICTION

The jurisdiction of this Court to review the decision of the Court of Appeals for the Third Circuit is based on 28 U.S.C. §2854(1).

QUESTION PRESENTED

Whether, in a diversity suit in which the jury found plaintiff entitled to be paid for construction work performed, this Court should exercise its supervisory power by granting a new trial because:

(a) the district court, without objection, asked one of defendant's witnesses who collected a commission from the seller and shared it with the buyer, whether his returning that part of the purchase price to the buyer was a kickback, and

(b) the trial judge, without objection, questioned defendant's witnesses about some details of the transactions involved?

STATEMENT OF THE CASE

Respondent, a building contractor, recovered a judgment of $112,509.05 for work done, and $16,817.78 for pre-judgment interest against defendant, in a diversity action in the District Court for the District of New Jersey.

After entry of judgment against petitioner in the district court, he filed an appeal with the Court of Appeals for the Third Circuit. That court affirmed the judgment without opinion and denied petitioner's petition for rehearing.

In this Court, petitioner relies upon two short episodes during a five-day trial as grounds for invoking this Court's supervisory power over the lower federal courts:

> (1) When one of petitioner's witnesses, a real estate broker, testified that he had returned to the purchaser part of the commission which the seller had paid to him (the broker-witness), the district court asked the witness whether that payment to the purchaser was a "kickback". Petitioner's counsel did not object to the question, and his witness denied that the payment was a kickback. When petitioner's counsel later objected to the use of the term "kickback" by respondent's counsel, his objection was overruled.
>
> (2) Later in the trial, the district court, without objection by petitioner's counsel, asked two of petitioner's witnesses questions which were calculated to clarify for the jury the complicated factual situation concerning ownership of the land, the various contracts involved, and the confusing financial details.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT'S INQUIRY AS TO EXISTENCE OF A "KICKBACK" WAS UNOBJECTIONABLE.

It was not improper for the district court to ask the witness whether his returning part of the purchase money to the purchaser was a "kickback", because that is exactly what it was. The broker-witness sold the property for a specified amount, out of which a specific commission was to be paid to him, and he agreed to return part of that amount to the purchaser. That is a "kickback" in the common, ordinary, everyday understanding of that word, as well known to the jury as to all others.

For example, in addition to the definition quoted in the district court's opinion, the term "kickback" defined in Webster's New Collegiate Dictionary (1959) as "a return of a part of a sum received, as of wages, commission, fees, etc. specif. because of a confidential agreement or coercion."

Similarly, The World Book Dictionary (1970) defines the term "kickback" as meaning "to return (a portion of the money received as a fee), often as the result of coercion or a previous arrangement."

Finally, in Webster's New Twentieth Dictionary (2d 1979), the term "kickback" is defined as "A giving back of part of money received as payment, commission, etc., often as a result of coercion or previous understanding."

This Court would have difficulty in chastising a district court for *asking* a witness about such an accurate characterization. Even if the district court had asserted that the payment was a kickback — which he did not — such a statement would have been unassailable.

II. THE "KICKBACK" ISSUE IS NOT OPEN IN THIS COURT BECAUSE PETITIONER DID NOT OBJECT WHEN THE DISTRICT COURT MADE ITS INQUIRY.

As disclosed by the excerpts from the trial transcript on page 4 of the petition, petitioner's counsel did not object when the district court asked petitioner's witnesses "Is it a kickback of a part of the purchase price?" By not objecting, counsel not only revealed that he too recognized the "kickback" as such; he also waived any objection. Consequently, the issue is not open in this Court.

Applying the philosophy of Rule 46 of the Federal Rules of Civil Procedure, the Courts of Appeals have consistently held that, unless there has been a miscarriage of justice — which could not be asserted in this case — a party cannot raise objections to events and rulings at trial for the first time on appeal. See, for example: *Morreale v. Downing*, 630 F.2d 286 (5th Cir. 1980); *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Wellman v. Jellison*, 593 F.2d 876 (9th Cir. 1979); *Magill v. Westinghouse Electric Corporation*, 464 F.2d 294 (3rd Cir. 1972).

Obviously, there can be no miscarriage of justice in affirming a jury verdict which merely allowed a builder to recover for work performed. The decision of the Court of Appeals is therefore correct, whether it be based on the absence of error on the part of the district court, or waiver of the "kickback" issue by petitioner's failure to make timely objection when the inquiry was made.

III. THE DISTRICT COURT'S QUESTIONING FOR THE GUIDANCE OF THE JURY WAS NOT ONLY UNOBJECTIONABLE BUT NOT OBJECTED TO BY PETITIONER'S COUNSEL.

The district court asked questions to clarify the details of the complicated real estate transaction and the financial aspects of the agreements and their performance. The district court unquestionably had the right to make such inquiries. The district court has the "power to elicit the truth by an examination of the witness." *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 470 (1941).

As Mr. Chief Justice Hughes said in *Herron v. Southern Pacific Company*, 283 U.S. 91, 95; 51 S.Ct. 383, 384, (1931):

> "In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides."

This case involved complicated factual and financial questions. The trial lasted five court days and involved extensive, complex exhibits as well as live testimony. In such a case, it is the prerogative of the trial judge to take an active role to see that the jury understands the case so that justice will be accomplished. As the Court of Appeals stated in *Heron v. Heron*, 393 F. 2d 652, 656 (3d Cir. 1968):

> "It is axiomatic that the function of a trial judge in a federal court is much more than that of a mere arbitrator to rule upon objections and to instruct the jury. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to obtaining justice between the parties. *Knapp v.*

> *Kinsey*, 232 F.2d 458, 466 (6th Cir.) *cert. denied* 52 U.S. 92, 77 S.Ct. 131,1 L.Ed. 2d 86 (1956). 'i[t] is his duty to see that the issues are not obscured and that the testimony is not misunderstood.' "

See, *Hite v. Western Maryland Railway*, 217 F.2d 781 (4th Cir. 1954) *cert. den.* 349 U.S. 96, 75 S.Ct. 890 (1954); *Powers v. I. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964) *cert. den.* 377 U.S. 980, 84 S.Ct. 1886 (1964)

Particularly where the issues are complex, it is the duty of the trial judge to intervene in the proceedings, because ". . . a judge is not wholly at the mercy of counsel, and would be remiss if he did not participate in questioning to speed proceedings and eliminate irrelevancies." *Riggs, Ferris & Geer v. Lillibridge*, 316 F.2d 60, 61 (2d Cir. 1963).

The degree of court participation in the trial of any case is within the sound discretion of the trial judge. *Kolman v. Jacoby*, 419 F.2d 395 (3d Cir. 1969). The questions here involved were appropriate to assist the jury in properly understanding the facts and circumstances of this case. This was particularly true with reference to the court's questions with regard to ownership of the land and the building, which were necessary for clarification of important issues in the case.

Since no conduct by the trial judge was inconsistent with substantial justice to the parties, petitioner was not entitled to a new trial.

Moreover, as the excerpts from the trial transcript included in the petition show, petitioner's counsel did not at any time object to any of the district court's questions. Consequently, even if there were such an issue in this case at the trial court level, it is not open in this Court, for reasons already outlined.

CONCLUSION

For all the foregoing reasons, in addition to the fact that this case presents no conflict of decisions and no issue of importance to anyone other than these particular litigants, the petition for certiorari should be denied.

Respectfully submitted,

James M. Marsh
Stephen J. Springer
R. Michael Carr

Counsel for Respondent

Of Counsel:

LABRUM AND DOAK
700 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103
(215) 561-4400